SUPREME COURT, U. S.

FILED
SEP 5 1961
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. 386

F. L. McCLANAHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IRVING L. GOLDBERG,
2232 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner.

Of Counsel:

WILLIAM P. FONVILLE,
2232 Republic National Bank Building,
Dallas 1, Texas.

WARLICK LAW, INC.—2263 VALDINA STREET—DALLAS—RI 1-6711

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	2-8
Reasons for Granting the Writ	8-12
Conclusion	14
Proof of Service	14
Appendix	
Opinion Below	15
Judgment Below	30
Order Denying Petition for Rehearing	31
Order Staying Mandate	32

Index of Authorities

	Page
Federal Rules of Criminal Procedure, Rule 52 (b)	13
Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321	9, 11
Sullivan v. United States, 176 F. 2d 723	9, 10
United States v. Meltzer, CCA 7, 100 F. 2d 739	12
United States v. Murdock, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381	9, 11

In the

Supreme Court of the United States

OCTOBER TERM, 1961

No. .....

F. L. McCLANAHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

F. L. McClanahan, hereinafter called petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on July 7, 1961, on which timely filed petition for rehearing was denied by that court on August 10, 1961.

OPINION BELOW

The opinion of the Court of Appeals (Infra Appendix) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was dated and entered on July 7, 1961 (R. p. 334, Appendix p. 30).

The Court of Appeals, on August 10, 1961, entered an order denying petitioner's timely filed petition for rehearing (R. p. 358, Appendix p. 31).

The jurisdiction of this court is invoked under the provisions of 28 U. S. C. Section 1254(1).

QUESTION PRESENTED

Whether in a criminal prosecution on an indictment containing one count charging willful attempted evasion of income tax for one year in which there is evidence from which a lack of willful intent may reasonably be drawn, the court may in its instructions to the jury, without referring to or analyzing for the jury the evidence favorable to the accused on the issue of willful intent, state to the jury "In determining the guilt of the defendant the wilfullness of the act becomes apparent."

STATEMENT OF THE CASE

Petitioner, an oil man and compulsive gambler (R. pp. 198-199), was prosecuted upon an indictment containing one count charging him with willful attempted evasion of income tax for the fiscal year ended March 31, 1951 (R. pp. 4-5). The prosecution's case proceeded upon the theory that net gambling winnings of $49,225.00 had been willfully omitted by petitioner from his joint Federal income tax

return for that fiscal year (R. pp. 123-124). That income tax return reported net community income for the year of $51,947.91 and reflected net income before depletion and depreciation, and including capital gains of $99,372.28 (R. pp. 13-32). The return reported no gambling winnings or gambling losses (R. pp. 13-32). The prosecution introduced checks purporting to represent petitioner's winnings on football wagering in the aggregate of $97,525.00 and checks which it conceded represented losses by petitioner at such wagering in the aggregate of $48,300.00, or net winnings of $49,225.00 (R. pp. 33-37, 46-48, 81-82, 96, 120-125). Checks purporting to represent winnings were made payable to L. C. McLanahan and Sam F. Smith (R. pp. 34 A, 46-47). The prosecution introduced an oral statement made by petitioner to the investigating special agent that he had not deposited his gambling winnings in his bank account because the Internal Revenue would charge his gambling winnings to him as income (R. p. 91). The investigating special agents testified that as early as in 1952 and 1953 the petitioner had stated to them that he had won at football wagering in the fiscal year ended March 31, 1951, but that he had lost more than such winnings in gambling at Las Vegas, Nevada at six named gambling houses at the race track (R. pp. 77, 92, 113, 116). The investigating special agent in charge of the case testified that no effort to follow up such leads and no investigation of such leads had been made (R. pp. 111-118).

Petitioner testified that he made it a practice to withdraw funds from his business bank account and place such funds in currency in his bank lock box; that he did this in order to

keep his bank balance low for the reason that another had unlimited authority to draw on his bank account (R. pp. 162, 204-205). Petitioner testified that he had stopped depositing his gambling winnings in his bank account because the Government would accept his deposits as winnings but would not allow his losses unless he had an affidavit or documentary evidence to identify the loss (R. pp. 206-207); that it was not his purpose to conceal his income from the Government or to evade tax on it (R. p. 207); that he could keep track of his net winnings in that way (R. pp. 212-214). Petitioner testified that he had requested checks paying winnings to be made payable to "Sam F. Smith" in order to be able to negotiate the checks in payment of his gambling losses to others who did not want to accept checks bearing his correct name because of his prominence (R. pp. 205-206, 224).

Petitioner testified that in September of 1950 he withdrew $75,000.00 in currency from his lock box and deposited it with Harold Hind, credit manager of the Last Frontier Hotel in Las Vegas, Nevada, for use in gambling in Las Vegas; that he thereafter made trips to Las Vegas until March 30, 1951, the day he was married; that when he lost at gambling at the Last Frontier he would advise Hind; that he was well known at Las Vegas and when he gambled at other places than the Last Frontier he gambled on credit and when he lost he would write an order to the house on the Last Frontier and the house would take the order to Hind at the Last Frontier, who would pay it; that when he won he would deposit the winnings with Hind; that when he finally drew out the balance of his deposit on March 30, 1951, he had $3,000.00; that the differ-

ence of $52,000.00 represented net loss by him in gambling at Las Vegas in that period (R. pp. 201-203, 218).

Harold Hind, credit manager of the Last Frontier Hotel in Las Vegas in 1950 and 1951, testified to the deposit of the fund with him at the Last Frontier; that he had paid losses of the petitioner at the Last Frontier in the period September, 1950 to March 30, 1951 in the amount of $25,000.00 from the deposit and had paid losses of petitioner to other gambling houses at Las Vegas on orders of the petitioner from the deposit in the amount of at least $50,000.00 and that at the end of the period when petitioner drew down the balance of the fund there was $3,000.00 left in it (R. pp. 184-188, 191-193, 194-196, 197).

Petitioner testified that at the time he filed his joint Federal income tax return for the fiscal year ended March 31, 1951, he had been advised by his tax accountants, and so understood, that if his gambling losses exceeded his gambling winnings he was not required to report gambling transactions in his income tax returns that; accordingly, he did not report any gambling transactions in his return for that fiscal year because his losses had exceeded his winnings for the year (R. pp. 208-209).

Petitioner's tax accountant testified that he had advised petitioner that if his gambling transactions in the taxable year resulted in a net gambling loss no gambling transactions were required to be reported in the return (R. pp. 152-153).

Petitioner was shown to have had a good reputation for truth, veracity, honesty and integrity in 1951 (R. pp. 139-147).

Petitioner had cash withdrawals from his business in the three fiscal years ended March 31, 1951, exclusive of income tax payments and personal living expenses to have more than covered the claimed losses in excess of winnings (R. pp. 163-166).

In its instructions to the jury the court defined willful intent as follows:

> "The attempt to evade and defeat the tax must be a willful attempt, that is to say, it must be made with intent to keep from the government a tax imposed by law, which it was the duty of the defendant to pay to the government. The attempt must be willful, that is intentionally done with the intent that the government should be defrauded of the tax due from the defendant." (R. p. 249.)

And again,

> "An essential element in the offenses charged in this case is the element of specific intent involving bad purpose and evil motive. Unless you are satisfied from the evidence beyond a reasonable doubt that the defendant evaded taxes deliberately and with the specific intention of defrauding the government of taxes, the offenses charged have not been established and the defendant is entitled to acquittal, notwithstanding the evidence may satisfy you that the defendant may have understated the facts." (R. p. 256.)

In its instruction the court instructed the jury:

> "*In determining the guilt of the defendant, the willfulness of the act becomes apparent.* When an act is willfully done it may not always be proved by direct evidence; it may often be inferred from the conduct of the parties, taking into consideration that the normal mind must realize the probable consequences of his act.

> Willfulness may be inferred by the doing or saying of those things designed to bring about and put into effect or into course of operation an unlawful act. This may be inferred from the direct evidence of the several acts and general conduct of the parties. It may, likewise, be gathered from the circumstances surrounding the acts of the parties. These circumstances may be considered along with any direct evidence." (R. p. 250.)

This was inadvertent. The manuscript of the charge from which the judge read had the word "important" instead of "apparent", as read by the court (R. pp. 259-260).

The court did not anywhere in his charge point out to the jury or call its attention to or analyze for the jury the evidence favorable to the accused on the issue of willful intent (R. pp. 246-259).

The court instructed the jury that if during the trial or from the charge it had received any impression as to how the court felt about the case or the nature of the verdict that should be rendered the jury should disregard such impression, for the reason that the court was the judge of the law only and the jurors were the judges of the facts (R. p. 252).

At the conclusion of the charge, after the jury had retired, the court called for exceptions from the defendant. Petitioner's counsel, in stating petitioner's exceptions to the charge, called the court's attention to the erroneous use of the word "apparent", stating that he had taken the charge in shorthand and had recorded the word "apparent". The court stated that he thought he had used the word "important", the way it was written in the manuscript, and took no action on the matter. At the conclusion of the exception

by the defendant, the court said he would let the charge stand (R. pp. 259-260, 262).

During its deliberations the manuscript of the court's charge was sent in to the jury (R. p. 284).

The jury returned a verdict of guilty and the defendant was thereupon sentenced to serve a term of 13 months in the penitentiary and to pay a fine of $10,000.00 (R. pp. 263-265).

On appeal the Court of Appeals stated that counsel had left with the court below the impression that he was satisfied with the judge's belief that he had used the right word, and thus waived any criticism that might have been available if he had made it clear that he disagreed with the judge's understanding and that, moreover, the instruction that "In determining the guilt of the defendant the willfulness of the act becomes apparent" did not constitute prejudicial error, and affirmed the judgment (Appendix, pp. 19-20, 29, R. pp. 5-6, 334). Petitioner filed a timely petition for rehearing, which was denied (R. pp. 335-357, 358).

The basis for Federal jurisdiction in the court of first instance was, under Title 18, U. S. C. 3231, a criminal prosecution for violation of Section 145(b) of the Internal Revenue Code of 1939.

REASONS FOR GRANTING THE WRIT

The decision of the court below should be reviewed for the reason that it erroneously authorizes a district court, in a criminal prosecution in which specific willful intent is a vital

and essential element of the offense, on disputed facts from which an inference of a lack of willful intent may reasonably be drawn, without pointing out to the jury or analyzing for its benefit the evidence favorable to the accused on that issue, to instruct the jury that "In determining the guilt of the defendant the willfulness of the act becomes apparent". This decision is in conflict with the decision of the Court of Appeals for the District of Columbia in *Sullivan v. United States, 176 F. 2d 723.* It is opposed in principle to the holdings of this court in *Quercia v. United States, 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321,* and *United States v. Murdock, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381.* And if it can be said that the holdings of this court in *Quercia* and *Murdock,* supra, do not proscribe a one-sided instruction or comment by a trial court to a jury in a criminal prosecution on disputed facts to the effect that the essential element of willful intent is established, clear, or apparent, then the holding below erroneously decides an important question of Federal criminal procedure which has not been but should be settled by this court.

In this case petitioner in respect of incriminating admissions to the investigating agent testified to explanations consistent with a lack of tax evasion purpose. Petitioner admitted that he had net winnings of $50,000.00 at football wagering in the year but testified, as he had stated to the agents in the earliest stages of the investigation, that he had suffered gambling losses in an even larger amount in gambling in the casinos at Las Vegas. Petitioner was corrobo-

rated in such losses by the testimony of a disinterested witness. No gambling transactions were reported in petitioner's income tax return for the year. However, petitioner testified that he had been advised by his tax accountant, and so understood, that if his gambling losses exceeded his gambling winnings for the taxable year no gambling transactions were required to be reported in the return and, for this reason, having suffered a net gambling loss, he had omitted all gambling transactions from his return. Petitioner was corroborated in his understanding by the testimony of his tax accountant, who testified that he had so advised petitioner. On these facts it cannot be said that an inference of lack of willful intent to evade tax might not reasonably have been drawn.

In *Sullivan v. United States*, *178 F. 2d 723*, the Court of Appeals for the District of Columbia, in respect of a charge similar in content and circumstance to the one involved here, for which it reversed the trial court, held:

> "* * * As intent was the vital issue the statement was tantamount to expressing the court's judgment that the defendant was guilty.
>
> "The expression of such an opinion goes beyond the privilege of a judge to comment fairly upon the facts. Comment upon the evidence must be distinguished from expression of an opinion upon an ultimate issue determinative of guilt or innocence. The ill effect cannot be offset by instructing the jurors that the court's opinion is not binding on them and that they are the sole judges of the facts. * * * We think * * * that such statements have little, if any, tendency to undo the harm already done. The influence of the trial judge on the jury is of great weight and his slightest word or intimation is

> received with deference and may prove controlling. Quercia v. U. S. 1933, 289 U. S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321. That is especially so in a criminal trial. The damaging influence is more likely where conflicting evidence on a crucial issue leaves the outcome close, as it might have been in this case. * * *"

In *Quercia v. United States, 289 U. S. 466, 470, 53 S. Ct. 698, 77 L. Ed. 1321*, this court, recognizing the right of the trial court to comment upon the evidence in a trial by jury, reiterated it to be the duty of the trial judge to use great care that an expression of opinion upon the evidence should be so given as not to mislead and especially that it should not be one-sided. In *United States v. Murdock, 290 U. S. 389, 54 S. Ct. 223, 78 L. Ed. 381*, this court, reversing for a charge in which the trial court advised the jury that he felt that on the evidence in the case the Government had sustained its burden beyond a reasonable doubt, held that, although the power of a judge to express an opinion as to the guilt of the defendant exists, it should be exercised cautiously and only in exceptional cases. A case involving an essential element of willful intent in which on disputed facts an inference of a lack of such intent may reasonably be drawn is obviously not such an exceptional case.

In the case here, as well as in the *Sullivan* case, supra, the trial court instructed the jury that they were not bound by his opinion and were the triers of the facts. As the court observed in the *Sullivan* case, such admonitions can hardly serve to cure the harm done by the court's comment.

This is an important question of Federal criminal procedure. The Sixth Amendment of the Constitution, U. S. C. A.

Const. Amend. 6, provides that in all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury. The expression of an opinion by the trial judge upon the merits of the case and upon an essential issue which the jury is to determine is plainly an abridgement of that right and the damage cannot be overcome by admonishing the jury that they are not bound by it, but notwithstanding such opinion, it is their duty to form their own opinion from the facts and law in the case. This is especially true in a criminal case where the judge expresses his opinion that the defendant is guilty of the offense charged. Such procedure is productive of the following situation: Government's counsel says to the jury, "The evidence presented proves the defendant's guilt"; defendant's counsel says, "The evidence is insufficient to establish such guilt," and the judge says, "My opinion coincides with that of the Government. I likewise give it to you as my opinion that he is guilty. How any defendant could have a fair and impartial trial after such a proceeding is incomprehensible. Under such circumstances the right of trial by jury becomes an idle and useless ceremony. The verdict is not their independent judgment but represents a judgment altered and modified to conform to the court's desire in the matter.*

The court below stated that petitioner's counsel had waived any criticism of the error of the court in this charge in that, after calling the court's attention to the inadvertent, but eggregious error in the use of the word "apparent", counsel

*Paraphrase from the opinion of Judge Major in *United States v. Meltzer, CCA 7, 100 F. 2d 739*, concurring in the result with whose views Judge Treanor, also concurring in the result, joined.

did not argue with the court after he stated that he thought he had said it "important." The Court of Appeals stated that counsel clearly left the court with the impression that it was satisfied with the judge's belief that he had used the right word. The statement of the judge that the word was written "important" and that he thought he said it that way was not a conversational suggestion of a difference of a point of view, but a firm statement of the court's judgment as to what he had said, which admitted of no argument. There was certainly no intention to waive criticism of the charge. It was made clear to the court that counsel had taken the charge in shorthand as it was spoken and had recorded the word "apparent". The function of exception is to call error to the court's attention to the end that the court, if it sees fit, can correct the error. This was certainly done. The court ruled that he would let the charge stand as it was. Assuming arguendo that petitioner's counsel left the impression that he was satisfied with the court's belief that he used the right word, this would not cure the error. The jury heard spoken from the bench with the imprimatur of that high office "In determining the guilt of the defendant the willfulness of the act becomes apparent". Whatever the court thought he had said, that is what the jury heard him say. This was highly prejudicial error, however inadvertent, and even if it had not been called to the attention of the court, it would constitute error to be noticed under Rule 52(b) Federal Rules of Criminal Procedure as plain error affecting substantial rights of the defendant, not brought to the attention of the court.

CONCLUSION

The petition for the writ of certiorari should be granted for the reasons stated above.

Respectfully submitted,

IRVING L. GOLDBERG,
2232 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner.

Of Counsel:
WILLIAM P. FONVILLE,
2232 Republic National Bank Building,
Dallas 1, Texas.

PROOF OF SERVICE

I, Irving L. Goldberg, attorney for the petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21 day of September, 1961, I served copies of the foregoing petition for writ of certiorari on the Respondent United States of America by mailing copies in a duly addressed envelope, with first-class air mail postage prepaid, to the Solicitor General of the United States, Department of Justice, Washington 25, D. C., and by mailing a copy in a duly addressed envelope with first-class postage prepaid to the United States Attorney for the Northern District of Texas, United States Courthouse, Fort Worth, Texas.

IRVING L. GOLDBERG,
2232 Republic National Bank Building,
Dallas 1, Texas,
Attorney for Petitioner,
F. L. McClanahan.

APPENDIX

In the
UNITED STATES COURT OF APPEALS

No. 18665

F. L. McCLANAHAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas.

(July 7, 1961.)

Before TUTTLE, Chief Judge, and CAMERON and JONES, Circuit Judges.

TUTTLE, Chief Judge: This is the second appeal from a conviction of appellant of the charge of wilfully attempting to evade and defeat a part of the income tax owing by him for the fiscal year ending March 31, 1951, in violation of Section 145(b), Internal Revenue Code of 1939.

The first three grounds of appeal criticize parts of the trial court's charge to the jury; the next four attack the sufficiency of the evidence to warrant submission of the case to the jury and/or to sustain its verdict; two other grounds of appeal deal with the admission of evidence of an earlier omission of gambling income from appellant's income tax returns; the remaining three grounds are based on a criticism of parts of the oral argument of government counsel to the jury.

It was the government's contention, amply supported by proof, that the appellant had made gambling winnings of approximately $50,000, none of which was shown on his income tax return and which appellant had taken considerable effort to conceal.

Appellant, while conceding that he had such winnings, contended that he had suffered gambling losses of more than the amount of his winnings and that he was, therefore, under no duty to report the winnings. The government concedes that only the excess of gambling winnings over gambling losses represents taxable income. It does not concede, however, that there was no affirmative duty for the taxpayer to report his winnings as income and then claim his losses as deductions.

We dispose, first, of the grounds touching on the sufficiency of the evidence. In the first appearance of a case involving McClanahan's conviction for a 1951 income tax violation we held that the evidence was sufficient to sustain a verdict of guilt. *McClanahan v. United States*, 5 Cir., 272 F. 2d 663. The affirmative evidence presented on the present trial made an equally strong case against the taxpayer.

Appellant complains that the government did not pursue certain leads in an effort to substantiate his claim that he sustained large gambling losses at the racetracks and at a half dozen or so different gambling establishments at Las Vegas, Nevada. The simple answer to this contention is that the government was under no duty to run down these leads even if they had been specific enough to make such investigation feasible. The burden of showing the losses was on the defendant, once he admitted the existence of the winnings.

The appellant appears to draw from our earlier decision following his first conviction that there was no *duty* of appellant to *report* his gambling winnings unless they exceeded his losses. We find no basis for such view. This Court has long since held that gambling winnings of the type here involved are includable in gross income and that gambling losses, to the extent permitted by statute, are deductions, *Humphrey v. Commissioner*, 5 Cir., 162 F. 2d 853. They are so denominated in Section 23(h) of the 1939 Internal Revenue Code. Under the requirements of the gross income tax section of the Code, Section 22, therefore, there is a duty for a taxpayer to report his winnings. He may then, if he wishes to take advantage of the statutory provision, claim his gambling losses as deductions.[1] Thus, where it was conceded that there were unreported gambling winnings, the goveriment was under no burden to prove that there were no unclaimed deductions in order to carry its burden of proof here.

[1]The Court of Civil Appeals for the First Circuit draws a distinction between a gambler who, like McClanahan, makes his winnings and suffers his losses in separate transactions and a "professional" gambler who handles bets for others. It expounds the same view as did this Court so far as concerns individual gamblers. See Winkler v. United States, 1 Cir., 230 F. 2d 766.

We next consider the challenge to the court's jury charge. The criticism here is that the trial judge inadvertently used the word "apparent" when he intended to say "important" in a part of his charge. The transcript of the charge, as contained in the record, includes the following sentence: "In determining the guilt of the defendant the wilfulness of the act becomes apparent." At the conclusion of the court's charge the following colloquy occurred:

"Mr. Fonville:

"* * * In reading the charge the Court said, in determining the guilt of the defendant, as I understood it, 'The willfulness of the act becomes apparent', I either misunderstood the Court or the Court probably said 'apparent' instead of 'important'. Mine is in shorthand. I will try to find the part of the charge in which it appears.

"The Court:

"Is it in the requested charge?

"Mr. Fonville:

"No, it is in the main charge.

"The Court:

"Repeat it.

"Mr. Fonville:

"The sentence begins, 'In determining the guilt of the defendant'.

"The Court:

"All right.

"Mr. Fonville:

"It is not too far down in the charge, I would say about three or four pages.

"The Court:

"Yes, I have it, and it reads 'In determining the guilt of the defendant the willfulness of the act becomes important'.

"Mr. Fonville:

"As I got it the Court said 'apparent' rather than important.

"The Court:

"Well, it is written 'important', and I think I said it that way."

That is where the matter was left.

We agree with appellant that we must treat the matter on the assumption that the charge said "apparent" rather than "important." The United States does not take a contrary position. What it does say, though, and we think correctly, is that here there was no clear request by counsel that the court correct the charge. Counsel clearly left the court with the impression that he was satisfied with the judge's belief that he had used the right word. Counsel thus waived any criticism that might have been available to him if he had made it clear to the court that he disagreed with the judge's understanding.

Moreover, while the word "apparent" would not be correct in the challenged sentence, we think the subsequent parts of the charge adequately protected the accused. Appellant contends that the sentence, including the word "apparent," amounted to an expression by the court of its opinion that wilfulness had been proved. Assuming that contention to be correct, we do not think this would be prejudicial

error. It has been frequently stated that a trial judge may express his opinion of the facts if it is made clear to the jury that they are the triers of the facts and that they are not bound by his opinion, *Lott v. United States*, 5 Cir., 230 F. 2d 915, 918, cert. denied, 351 U.S. 953, rehearing den. 352 U.S. 860; *Kansas City Star Co. v. United States*, 8 Cir., 240 F. 2d 643, 644, cert. denied 354 U.S. 923.

Here the court repeatedly told the jury that before they could find a verdict of guilty they would have to find a wilful intent. The court also instructed the jury:

> "Another thing for you to bear in mind is that this charge should be taken as a whole and do not 'hang your hat' as it were, upon one point or peg without giving due consideration to all the evidence before you and all of the provisions of the charge. And if during the trial, or from this charge, you have gathered any impression as to how the Court feels about the case or the nature of the verdict that should be rendered, you will disregard that also, because the Court is the judge of the law only and you as jurors are judges of the facts."

We think no reversible error occurred for the inadvertent use of the word "apparent" by the court.

The next complaint about the charge is aimed at the following language:

> "So now, if you find from the evidence and believe beyond a reasonable doubt that the defendant did, about the time stated in the indictment, file a tax return, as alleged, in which he did willfully and knowingly attempt to conceal the amount of his income and evade the payment of taxes thereon for the fiscal year ended March 31, 1951, as required by law, then, in that event, you may find the defendant guilty.

> "In this case, if it appears that the defendant filed an income tax report setting forth a portion of his income, and if you find and believe from the evidence beyond a reasonable doubt that the defendant collected other sums of money and knowingly and willfully failed to include the same in the income tax reported and that his failure or refusal to so include these items was done with the intent of defeating in part the payment of the taxes due by him to the government, this failure to mention such sums would amount to concealment within the law.
>
> "An income taxpayer is due to pay income tax on winnings that he may have from gambling just as on income from other sources. However, if in gambling he loses money he may deduct his gambling losses from his gambling winnings, but he may not deduct his gambling losses from the legitimate income on which he would otherwise pay tax."

Appellant's objection to this charge was:

> "Now, the defendant objects to that portion of the Court's charge wherein the Court instructs the jury in this case (if) it appears that the defendant filed an income tax return setting forth a portion of his income and if you find and believe from the evidence, beyond a reasonable doubt that the defendant collected other sums of money and willfully and knowingly failed to include same in his income report, for the reason that that is not a correct statement of the law, and you authorized the jury in this case to find the defendant guilty by reason of having collected some gambling winnings, even though the losses exceed the winnings, because the Court says if he collected the other sums of money and knowingly and willfully failed to include the same in the income report; for the further reason that the law does not require money collected to be included in an income tax report; it requires only items of income."

We think there is no merit in this contention. This charge correctly stated that the failure to report other sums collected would amount to concealment *if such failure was*

knowing and wilful and was done with the intent of defeating in part the payment of the taxes due by him. We have already discussed above the duty of the taxpayer to report his winnings as income. A knowing and wilful failure to report such income, with the intent of defeating the payment of the taxes, would amount to concealment just as charged by the court.

In this connection it should be noted that the earlier judgment of this Court reversing a previous conviction was based on an inadequate charge explaining that only the net gains of winnings over losses constitute taxable income, and particularly the Court felt that the appellant had been prejudiced by the rather cryptic answer the trial judge made, out of the presence of the defendant, to a written inquiry from the jury touching on this matter. It is clear from our opinion in the earlier case that we felt that such answer practically amounted to a direction of a verdict of guilty on the undisputed evidence that McClanahan had unreported gambling gains. 272 F. 2d 663, 666.

The appellant next complains of that part of the jury's charge which said:

> "The jury will not concern itself or undertake to name the penalty in the event the defendant is found guilty. This duty or responsibility under the law devolves upon the judge. He will in the nature and course of events take into consideration the degree of wilfulness with which the act has been done. He will likewise take into consideration any and all mitigating circumstances connected with the transaction. He will consider the case both from the angles of justice and mercy. The only question for the jury is one of guilt or innocence."

We think that the above language given in the ordinary course of the judge's complete charge, and not in response to a special inquiry from the jury, would not be error. It was part of his statement that the jury was not to be concerned with the matter of punishment but that this was a matter for the judge to consider in the event of a verdict of guilty. The case is not like *Demetree v. United States*, 5 Cir., 207 F. 2d 892. We think it more nearly resembles the situation discussed by the Sixth Circuit in *Strauch v. United States*, 6 Cir., 213 F. 2d 805; vacated by the Supreme Court on a different ground, 348 U. S. 905. See also *Dicks v. United States*, 5 Cir., 253 F. 2d 713, 714, and *Erwin v. United States*, 6 Cir., 242 F. 2d 336, 337.

We come next to the contention that the court erred in admitting evidence, over counsel's objection, showing omission of gambling income "from a return for a year nine years prior to the year involved in the charge on which appellant was being tried."

The record discloses that the testimony complained of was that of a former internal revenue agent who was being questioned by the government as to his efforts to obtain from McClanahan records to substantiate his claimed gambling losses. After having testified at some length about his efforts to obtain such records, the witness testified, "I reminded Mr. McClanahan that as far back as 1942 and for every year up to the years I was investigating in that he had been asked by various special agents and revenue agents to produce his gambling records, and that he had produced none with the exception of a five day period in

1944. I asked him again for any records regarding the three years I was investigating."

Thereafter comes the testimony now objected to. The following colloquy took place:

"Q. Now, was there anything further said with reference to previous revenue agents with Mr. McClanahan—first—did he acknowledge that that was a fact?

"A. Yes, sir, he did.

"Q. Did you discuss deficiencies which he had settled for prior years on account of his gambling activities with him at this meeting?

"A. Yes, I mentioned that his income tax return—

"Mr. Fonville:

"I object to this testimony. I object to this witness going into previous years. The witness is talking about some tax payments that had been settled in prior years. It will have no materiality in this case and it is prejudicial.

"Mr. Hamilton:

"I think it is very material in this case. I think this witness has established that that very dispute was settled in this very year, and it has to do with the man's system, motive, and intent.

"The Court:

"How remote was the former offense?

"Mr. Hamilton:

"It was not settled until the year in this indictment and it covered the years 1942 through 1948.

"Mr. Fonville:

"And the Court understood from counsel that he was referring to an offense because the Court said, 'When

was the offense?' There was no offense involved, according to the witness. The witness said he had made some adjustments and settlements.

"The Court:

"I used the word 'offense' when perhaps I might have said transaction or occurrence, is what I had reference to. I will let him answer.

"(By Mr. Hamilton):

"Q. Did you discuss that with him?

"A. Yes.

"Q. Did you discuss with him the fact that that had just been settled in this year?

"A. Yes.

"Q. And what further discussion did you have with him along that line?

"A. Just the fact that his returns, or rather the investigation of his returns resulted in a settlement whereby some $50,000.00 additional gambling income was agreed on by both sides for the year 1942.

"Q. I will ask you whether or not you asked him what he did with his winnings during the period you were investigating?

"A. Yes, I did. He said that he put them in his lock box or else paid other gambling losses with them.

"The Court:

"Now, with reference to the lock box. Were you talking about that time or the former settlement in 1942, or about the funds that are now under consideration?

"The Witness:

"About the funds under consideration.

"The Court:

"The case now before us?

"The Witness:

"Yes, sir.

"The Court:

"Go ahead.

"(By Mr. Hamilton):

"Q. What did he say he did with his money?

"A. He put it in the safety deposit box in the First National Bank in Dallas or paid losses with it.

"Q. Did he state whether or not he put it in his bank account?

"A. He did not put it there.

"Q. Did you ask him why he had not deposited this money?

"A. He said he had not deposited it because the Internal Revenue would charge his gambling winning up to him as income.

"Q. Was anything stated with reference to his prior deficiency in that regard, what it was based upon?

"* * *.

"A. The additional taxes for the prior period was additional gambling income.

"Q. Do you know whether it was based on bank records or not?

"A. Yes, it was based on identified gambling winnings that were put in the bank less identified checks given for gambling."

We think this is not similar to evidence tendered by the government to show a similar failure to report income in a

remote prior year such as was the case in *Lloyd v. United States*, 5 Cir., 226 F. 2d 9. Here the testimony was of a witness telling of conversations and statements between him and the accused. In effect he stated that in an effort to get McClanahan to furnish him specific information or records touching on his claimed gambling losses, he reminded McClanahan that he had just been made to pay a $50,000 deficiency for an earlier year because of his failure to give adequate information. Furthermore, McClanahan's statement that for the year in question he did not deposit his gambling winnings in the bank "because the Internal Revenue would charge his gambling winning up to him as income," made it proper for the government to show, as it did in the last part of the testimony quoted above, that the additional assessment testified to had been arrived at by taking McClanahan's recorded bank deposits as proof of his winnings, giving him credit for "identified checks given for gambling" as a deduction. McClanahan's statement that he had not deposited his gambling winnings during the year in question but had rather put the money in safety deposit boxes, was certainly admissible. It was equally relevant for the government to prove that in arriving at the deficiency McClanahan had given credit for provable losses. We think, in short, that the testimony of the witness as to his efforts to get McClanahan to disclose the facts concerning his gambling losses was admissible as throwing light on appellant's conduct, especially his failure to produce evidence convincing to the jury that he actually suffered substantial losses.

When McClanahan testified, he stated that the agents "wouldn't let me have any losses I had during those years,"[2] and that it was for this reason that he put his money in a lock box. It was certainly relevant for the government to show that credits were allowed for all "identified checks for gambling." Thus, even if the evidence had been inadmissible when given, no harm is shown because the government could clearly explain just how the deficiency was handled to rebut Mr. McClanahan's testimony.

We do not think reversible error occurred in the failure of the trial court either to declare a mistrial, which was not requested, or in not granting a new trial because of the prosecuting attorney's statement during the course of the trial, "This is not the first time; this is his second time. He didn't get prosecuted before but he is being prosecuted now."

Counsel for appellant objected to this statement by saying, "I object to that argument as being unfounded upon the evidence in this case. There is nothing in this case that there is former offense." Whereupon, a government counsel stated, "I will stipulate that there was no former offense." The Court then said, "Yes, I think we told the jury that after an objection made during the trial, so the instruction still stands."

Counsel did not request the court to declare a mistrial nor did he request any further clarification of the matter at the

[2]This came up on questions on his direct testimony:

"Q. Now, Mr. Baskett testified something about having a conversation with you and you said something about putting your money into a lockbox. Tell the Court and jury what you said to Mr. Baskett in that respect.

"A. I had told him since the government had charged me income tax for the years 1942 through 1948 that I was now putting it in a lock box, I would keep my records, since they wouldn't let me have my losses I had during those years."

time. While it would have undoubtedly been better not to have implied that the prior deficiency of $50,000, which we have discussed above, might have resulted in a prior prosecution, we do not think that the statement by counsel requires a reversal of the judgment of conviction in the absence of a motion for mistrial. We think it plain that the trial court made it clear to the jury that there had been no previous criminal offense charged against McClanahan.

The final point raised by appellant is that a witness for the prosecution was permitted to testify that he had examined records in Chicago which were not introduced into evidence or available at the trial, and that he had found no other transactions than the ones that had been admitted on stipulation. We think this point is without substance since a witness may clearly testify as to his failure to find the records after a search. This, in fact, is frequently the only way in which a negative fact can be proved. See *Nichols v. United States*, 5 Cir., 48 F. 2d 46, 49, and Keith v. United States, 5 Cir., 250 F. 2d 355, 356.

Finding no error, we conclude that the judgment must be AFFIRMED.

CAMERON, Circuit Judge, I concur in the result.

JUDGMENT.

Extract from the Minutes of July 7, 1961

No. 18665

F. L. McCLANAHAN

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Cameron, Circuit Judge, Concurs in the Result."

* * * * *

[460] FILED
10th day of August, 1961
EDWARD W. WADSWORTH
Clerk of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18,665

F. L. McCLANHAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Northern District of Texas

---

(August 10, 1961)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, CAMERON and JONES, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

OPINION DENYING REHEARING—
FILED AUGUST 10, 1961

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18665

F. L. McCLANAHAN,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from August 10, 1961; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from August 10, 1961 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme

Court denying the writ, or upon the expiration of thirty days from August 10, 1961, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ELBERT P. TUTTLE
United States Circuit Judge.

(ORDER STAYING MANDATE, FILED: August 26, 1961)

Dated: